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No. 350

In the Supreme Court of the United States

OCTOBER TERM, 1929

THE BASSICK MANUFACTURING COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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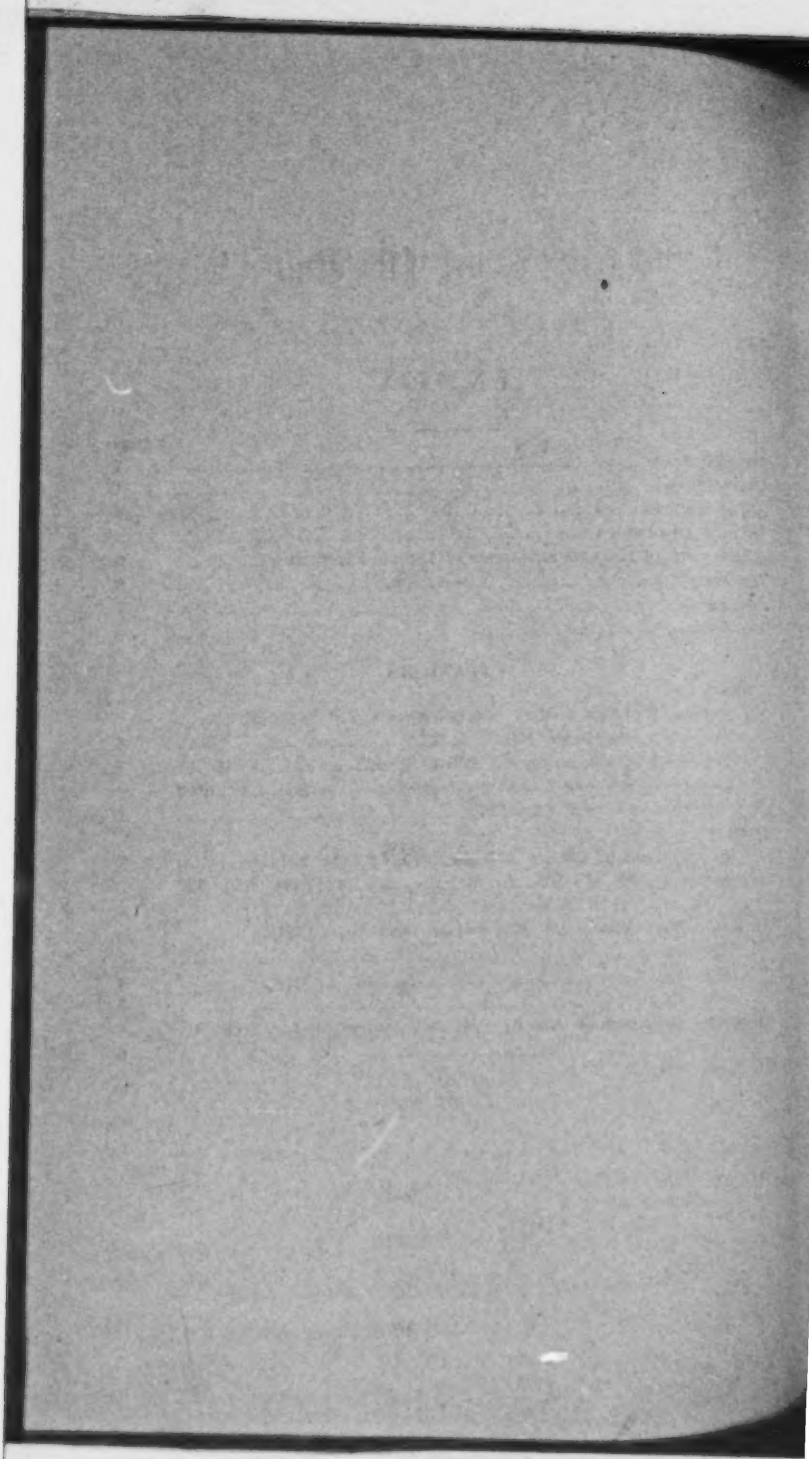

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OPINION BELOW

The memorandum opinion of the Court of Claims (R. 14) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered June 10, 1929. (R. 14, 15.) Petition for writ of certiorari was filed August 29, 1929. (R. 15.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioner established in the court below that the gascolators (gasoline straining devices)

which were manufactured and sold by it during the period from September 1, 1922, to February 28, 1926, and which were adaptable for use on automobile engines and other engines were not automobile "parts" or "accessories" within the meaning of Section 900 (3) of the Revenue Act of 1921 and Section 600 (3) of the Revenue Act of 1924, and of the regulations of the Commissioner of Internal Revenue issued under the authority of those Acts.

STATUTES INVOLVED

Section 900 of the Revenue Act of 1921, c. 136, 42 Stat. 227, 291, so far as applicable, provides:

> That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—
>
> (1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;
>
> (2) Other automobiles and motor cycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;
>
> (3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of

any of the articles enumerated in subdivision (1) or (2), 5 per centum;

* * * * * *

Section 600 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 322 (U. S. C. title 26, sec. 881), follows Section 900 of the Act of 1921 in substance.

REGULATIONS OF THE COMMISSIONER OF INTERNAL REVENUE

Article 14 of Treasury Regulations 47 (revised December, 1921), issued under the 1921 Act, is in part as follows:

Tires, inner tubes, parts, and accessories sold to manufacturers.—The words "tires, inner tubes, parts, or accessories" shall be understood to embrace only such tires, inner tubes, parts, or accessories as have reached such a stage of manufacture that they constitute articles commonly or commercially know as "tires, inner tubes, parts, or accessories," and shall not be understood to embrace raw materials used in the manufacture of such articles.

Unvulcanized sheet rubber, liquid rubber vulcanizing cement, and friction fabrics are considered raw materials, and are exempt from tax.

Any article which has reached a state of manufacture wherein it is in itself a component part or accessory, and is of such a nature that it may be used or attached by an ordinary repair man or individual user as distinguished from a manufacturer or producer, is subject to tax as a "part or accessory."

Article 15 is in part as follows:

Definition of parts.—A "part" for an automobile truck, automobile wagon, other automobile, or motor cycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use and which is primarily adapted only for use as a component part of such vehicle.

The term includes bodies, wheels, engines, springs, axles, radiators etc. When sold separately a side car and a so-called trailer or "semitrailer" so designed that a portion of the load or the weight thereof is carried or borne by the tractor or "semitractor" are taxable as "parts."

Mere stock or commercial commodities, such as bolts, nuts, washers, screws, etc., though used as components for such vehicles, are not "parts" within the meaning of subdivision (3). Articles, however, which ordinarily would be classed as commercial commodies become parts when, because of their design or construction, they are primarily adapted for use as component parts of such vehicle.

Component parts of articles taxable under this definition are taxable when sold separately if they have reached such stage of manufacture that they are primarily adapted for use as a component part. * * *

Article 16 contains the following provisions:

Definition of accessories.—An "accessory" for an automobile truck, automobile wagon, other automobile, or motor cycle is any article designed to be attached to or used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for use in connection with such vehicle, whether or not essential to its operation.

The term "accessories" includes, for example, automobile tops, back and side curtains, horns, speedometers, self-starters, spot lights, shock absorbers, tire pumps, pressure gauges, and hydrometers.

Articles which have a general commercial use and which are not especially designed and peculiarly adapted for use in connection with automobile trucks, automobile wagons, other automobiles, or motor cycles are not subject to tax as "parts" or "accessories." Thus a wrench or other tool of a kind ordinarily sold in hardware stores for general purposes is not subject to tax when sold separately, but if incorporated in an automobile tool kit, designed, intended, advertised, or held out for use on an automobile as distinguished from garage or shop equipment, is taxable as part of the completed kit.

A wrench or other tool of special design or construction primarily adapted for use in connection with automobiles is taxable.

If any doubt exists as to the special adaptability of any article, the fact of its sale by

the manufacturer to be used with an automobile, or to an automobile accessories dealer, would determine its taxability.

Robes, goggles, and lunch kits are not subject to tax. Asbestos brake-band linings, generator tubing, and radiator hose are not subject to tax unless sold in prepared sizes, lengths, shapes, or with such fittings as make them adapted for use only on or in connection with automobiles.

Parts or accessories for automobile trucks, automobile wagons, other automobiles, or motor cycles primarily adapted for use on or in connection therewith when sold for any other purpose are not taxable provided the purchaser files with his order a statement that such parts or accessories are to be used on or in connection with another article of commerce not enumerated or included in subdivisions (1), (2), or (3) of Section 900. * * *

Articles 15, 16, and 17 of Treasury Regulations 47 (revised August, 1924), issued under the 1924 Act, differ in no material respect from those just quoted.

STATEMENT

Petitioner sued in the Court of Claims to recover excise taxes in the sum of $15,616.01, plus interest, assessed against it with respect to gascolators manufactured and sold by it during the period from September 1, 1922, to February 28, 1926. (R. 2, 8.)

In deciding against the petitioner the Court of Claims found the following facts (R. 10–11):

The function of a gascolator is to strain dirt, water, grit, or any foreign matter from gasoline before it reaches the carburetor of an internal-combustion engine. The gascolator is placed between the fuel tank and the carburetor. Gascolators were sold by petitioner to and used during the period October 31, 1922, to March 31, 1926, by airplane, farm implement, automobile, and industrial machinery manufacturers. Said gascolators were adaptable for use on internal-combustion engines which are used to drive tractors, airplanes, industrial machinery, motorboats, marine boats, and automobiles, and were interchangeable on any combustion engine dependent on the size of the fuel pipe and the adapter, which is a device to connect the fuel pipe to the gascolator. The difference in the gascolators sold by petitioner was in the size of the adapter which connects the gascolator to the fuel pipe. The gascolator could be attached to the fuel pipe without the adapter by swedging the fuel pipe to the gascolator.

"It does not appear from the evidence what, if any, part of the taxes sought to be recovered herein were paid for gascolators sold to automobile manufacturers, or for uses other than for automobiles."

ARGUMENT

The burden was on the petitioner to prove in the Court of Claims the facts establishing the invalidity of the taxes sought to be recovered. *United States* v. *Anderson,* 269 U. S. 422, 443. Petitioner admits

that its product "is a useful and desirable accessory for an automobile engine" and that it "advertises and holds it out to the automotive trade as such," but contends that "it is not a necessary accessory and its utility is not limited to automobile engines or motors." (Brief, p. 3.) To be an automobile "accessory" an article need not be "essential" to the operation of an automobile. (See Article 16, Treasury Regulations, p. 5, *supra.*) An article may be an automobile "part" or "accessory" even though it may be possible to utilize it for other purposes. Most automobile parts and accessories could be so utilized. We submit that, to prevail, petitioner must show that its product is used principally or chiefly for other than automobile purposes. Cf. *Magone* v. *Wiederer,* 159 U. S. 555. No finding of the Court of Claims establishes this fact. The Court of Claims has found that "It does not appear from the evidence what, if any, part of the taxes sought to be recovered herein were paid for gascolators sold to automobile manufacturers, or for uses other than for automobiles." (R. 11.) We therefore contend that petitioner has failed to sustain the burden imposed upon it of showing that the taxes which it seeks to recover were imposed on nontaxable articles. See *Botany Worsted Mills* v. *United States,* 278 U. S. 282, 290.

CONCLUSION

While the Government opposes the petition in this case, it is compelled to admit that the findings

in the instant case are as meagre as those in the similar case of *Universal Battery Co.* v. *United States*, No. 127, in which this Court on October 14, 1929, granted a writ of certiorari.

Respectfully submitted.

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